

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARNEST BURNEY,

Defendant-Appellant.

UNPUBLISHED

March 26, 2002

No. 228695

Wayne Circuit Court

LC No. 99-011511

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of attempted armed robbery, MCL 750.92, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to seventeen months to five years imprisonment on the attempted armed robbery conviction to be served consecutively to the mandatory two years imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant and his cousin (the co-defendant at trial) approached the victim as she was entering her home. Each man displayed a gun. Although it was dark, there was enough light to see their faces and they were very close to her. She began to scream and a struggle ensued as they pulled at her purse. The victim was struck in the face, she fell to the ground and defendant began kicking her. The two men fled when the victim's mother came to the door, taking with them the victim's cell phone, and her purse containing money, identification and other personal items. They were arrested shortly afterwards. Two days later, the victim identified defendant at a photographic lineup.

II

Defendant argues that the court's verdict was inconsistent with its findings of fact and was the result of a compromise and that he is therefore entitled to reversal of his conviction¹. We disagree.

¹ Defendant's reliance on *People v Burgess*, 419 Mich 305; 353 NW2d 444 (1984), is misplaced.
(continued...)

MCL 750.529 provides that an armed robbery occurs when a victim is assaulted, the perpetrator is armed with a dangerous weapon, and when property is feloniously taken from the victim's person or presence. An attempt is established by showing that a defendant intended to commit a crime but failed to complete it. MCL 750.92.

In issuing its findings of fact, the court did find that each of the elements of armed robbery had been proven beyond a reasonable doubt. Nonetheless, the court went on to find defendant guilty of only the lesser included offense of attempted armed robbery and felony-firearm.² Based on our review of the lower court record, we can only conclude that the trial court was "affording defendant a measure of leniency" to relieve him of conviction of a maximum life-sentence felony, which did not exceed the court's authority. *People v Smith*, 231 Mich App 50, 52-52; 585 NW2d 755 (1998).

Because the elements of attempted armed robbery are subsumed in the elements of armed robbery, i.e., attempted armed robbery is a necessarily included offense of armed robbery, we find that the court's verdict was not inconsistent.³ Moreover, defendant has failed to establish that the court's verdict prejudiced him in any way, or that he is entitled to relief. The right to due process of law merely requires that a defendant cannot be convicted of an offense unless each element of the offense has been proven beyond a reasonable doubt. *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). The lower court record establishes that every element of attempted armed robbery was proved beyond a reasonable doubt, and the trial court so found. There has been no error requiring reversal.

III

Next, defendant argues that the use of a photographic lineup while he was in custody violated his procedural due process right to participate in a corporeal lineup, and also that the court erred by allowing the evidence to be admitted. We disagree.

No pretrial motion to suppress the photographic lineup evidence was made, nor did counsel object to its admission at trial. Defendant does not argue that the photo display was unduly suggestive. This issue is unpreserved for appellate review and our review of the record convinces us that defendant has failed to carry his burden to show that plain error occurred and that prejudice resulted. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Because defendant was in custody, he was entitled to have counsel present at any pretrial identification procedure. *People v Kurylczyk*, 443 Mich 289, 302 (Griffin, J.); 505 NW2d 528 (1993). Defendant was represented by counsel, even though it was not the counsel who

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Burgess involved a claim of an inconsistent verdict rendered by a jury where there was a multiple-count information. The brief reference to bench trials is pure dicta and, even so, the opinion does not preclude a trial court sitting as factfinder from exercising leniency or reaching inconsistent verdicts. The same can be said of *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980).

² Defendant makes no claim of inconsistency in the verdict relating to the felony-firearm charge.

³ The trial court reached the same conclusion in ruling on defendant's motion for new trial.

ultimately represented him at trial. There is no authority for defendant's position that the counsel at both procedures must be one and the same individual.

At the hearing on defendant's motion for new trial, the court explained that it did not even consider or rely upon the victim's pretrial identification. At trial, the victim testified that defendant was "very close" to her during the robbery; defendant held a gun to her side, and pulled one of her arms; she accidentally hit defendant during the struggle, and defendant kicked her in the stomach after codefendant knocked her to the ground. She could see the attackers' faces because "they were so close." Given the victim's unwavering in-court identification of defendant⁴, the court had no need to rely on her pretrial identification of him and in fact indicated that it did not.

Based on the totality of the circumstances, we cannot conclude that error occurred. Even assuming error occurred, defendant has not established prejudice.

IV

Next, defendant argues that there was insufficient evidence to support his convictions. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

Defendant contends that at the time of the robbery, it was dark outside, that he and the codefendant were arrested four to five miles from the scene of the crime, there were no witnesses to the escape vehicle, and that no weapons or stolen property were recovered. Additionally defendant points out that there was no testimony describing the dispatch which the arresting officer relied upon to identify defendant as the perpetrator. Thus, defendant asserts, the evidence was insufficient of identity to support the convictions. We disagree.

To the extent that defendant contends that the victim's testimony was "speculative," that is a credibility determination; this Court should not interfere with the factfinder's role of determining the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, there was evidence that a street light was on; the street light was "right outside" the house where the offense occurred. Thus, defendant's repeated contention that plaintiff failed to establish "as to the actual amount of illumination" is misplaced and, ultimately, irrelevant; as noted, the victim was consistently unequivocal in her identification of defendant as one of the assailants. She described what defendant was wearing during the robbery and that description closely matched what defendant was wearing when he was arrested shortly after the crime.

⁴ In ruling on defendant's motion for new trial, the trial court held that the victim "made a positive, independent, in-court identification of the defendant as the person who robbed her."

The victim was also steadfast and unequivocal in her testimony that defendant carried a gun. Although no weapon was recovered, the two men fled through an open field near abandoned houses when the arresting officer pursued them on foot; as he testified, “[t]hey could have threw it anywhere.” Moreover, the officer testified that he called the police station for another description of the perpetrators just to make sure that he had remembered correctly; the description matched defendant and the codefendant “to a T” and included descriptions of the clothes they were wearing. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt.

V

Next, defendant contends that he was denied the effective assistance of trial counsel because counsel failed to object to the admission of the pretrial identification evidence and failed to file any pretrial motion to suppress, and also asserts that he was prejudiced by these failures. We disagree.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *Hurst, supra* at 641. Moreover, to establish that defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel’s representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant has not established that the pretrial identification was improper or that he was unrepresented by counsel; accordingly, the identification evidence was properly admitted and counsel was not ineffective for failing to make an issue of it. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Furthermore, even assuming that counsel’s failure was error, defendant has not shown that he was prejudiced. As noted above, there was ample evidence connecting defendant to the robbery, and even if counsel should have attempted to suppress the photographic lineup evidence, any error did not prejudice defendant.

We also note that on appeal defendant makes the bare bones assertion that counsel’s failure “to take any action to attempt to suppress statements of the Complainant relating to the possession of a gun” also constituted ineffective assistance. Defendant has provided no legal or factual basis for this isolated claim; therefore, we are unable to consider it.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot